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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 337. 47

ANTHONY F. SEEBERGER, COLLECTOR OF CUSTOMS FOR THE PORT AND DISTRICT OF CHICAGO, PLAINTIFF IN ERROR,

vs.

BERNARD CAHN, CHARLES CAHN, JOSEPH CAHN, LOUIS WAMPOLD, AND DAVID WALLACH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JUNE 15, 1887.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court rooms in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, judge of the district court of the United States for the northern district of Illinois, on Monday, the fourteenth day of March, in the adjourned March term of said court in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and eleventh year.—Wm. H. Bradley, clerk.

BERNARD CAHN, CHARLES CAHN, JOSEPH Cahn, Louis Wampold, and David Wallach
vs.
ANTHONY F. SEEBERGER, COLLECTOR OF CUSTOMS for the port and district of Chicago. } 20262. Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-first day of August, 1886, came the plaintiffs by their attorney and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois at Chicago in said district, their bond for costs and præcipe for a writ of summons in said entitled cause, which said bond and præcipe are respectively in the words and figures following, to wit:

2 *Bond for costs.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, October term, A. D. 1886.

CAHN ET AL.
vs.
SEEBERGER, COLLECTOR, &C. } In assumpsit.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them, I hereby agree and stipulate that execution may issue against my property for any costs taxed against them.

Dated this 21st day of August, A. D. 1886.

P. L. SHUMAN.

(Endorsed:) Filed Aug. 21, A. D. 1886. Wm. H. Bradley, clerk.

3 *Præcipe.*

UNITED STATES OF AMERICA,
Northern Dist. of Ill., ss:

United States circuit court northern dist. Ill. October term, A. D. 1886.

BERNARD CAHN, CHARLES CAHN, Joseph Cahn, Louis Wampold, & David Wallach, as Cahn, Wampold & Co.,
vs.
ANTHONY F. SEEBERGER, COLLECTOR of customs for the port and district of Chicago.
} Assumpsit. Damages, $200.

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of trespass on the case upon promises to the damage of said plaintiffs in the sum of two hundred dollars, and direct the same to the marshal of said district to execute and make it returnable to the October term of said court, A. D. 1886.

Chicago, August 21, 1886.

PERCY L. SHUMAN,
Plaintiff's Attorney.

To WM. H. BRADLEY, Esq., *Clerk.*

(Endorsed:) Filed Aug. 21, 1886. Wm. H. Bradley, clerk.

4 On the same day, to wit, on the twenty-first day of August, 1886, there issued out of said clerk's office a writ of summons in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon Anthony F. Seeberger, collector of customs for the port and district of Chicago, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Bernard Cahn, Charles Cahn, Joseph Cahn, Louis Wampold, and David Wallach, as Cahn, Wampold & Co., of a plea of trespass on the case upon promises, to their damage, as is alleged, of two hundred dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America at Chicago, aforesaid, this 21st day of August, in the year of our Lord one thousand eight hundred and eighty-six and of our Independence the 111th year.

[SEAL.] WM. H. BRADLEY,
Clerk.

5 *Return of marshal.*

I have served the within writ by reading the same to and within the presence and hearing of Anthony F. Seeberger, collector of customs for the port and district of Chicago, therein named, on the 21 day of August, 1886.

F. H. MARSH,
U. S. Marshal.
By W. H. MITCHELL,
Deputy.

(Endorsed:) Returnable Oct. term, A. D. 1886. Wm. H. Bradley, clerk. Filed Aug. 21, A. D. 1886. Wm. H. Bradley, clerk.

Afterwards, to wit, on the twenty-third day of August, 1886, came the defendant, by his attorney, and filed in said clerk's office his appearance in said entitled cause, which said appearance is in the words and figures following, to wit:

Appearance.

United States circuit court, northern district of Illinois.

BERNARD CAHN ET AL.
vs.
ANTHONY F. SEEBERGER, COLLECTOR, ETC. } Assumpsit.

The appearance of Anthony F. Seeberger, defendant in this cause, is hereby entered by his attorney.

WM. G. EWING,
United States Attorney.

(Endorsed:) Filed Aug. 23, 1886. Wm. H. Bradley, clerk.

6 Afterwards, to wit, on the tenth day of September, 1886, came the plaintiffs, by their attorney, and filed in said clerk's office their declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the United States circuit court for the northern district of Illinois.
To the October term, 1886.

Bernard Cahn, Charles Cahn, Joseph Cahn, Louis Wampold, and Henry Wallach, copartners doing business under the firm name of Cahn, Wampold & Co., plaintiffs in this suit (which is a suit arising under the revenue laws of the United States, and is brought to recover duties claimed by the plaintiffs to have been illegally exacted of them and by them paid under protest) by P. L. Shuman, their attorney, complain of Anthony F. Seeberger, collector of customs for the port and district of Chicago, defendant herein, who was summoned, etc., of a plea of trespass on the case on

promises; for that whereas the said plaintiffs heretofore, to wit, on the first day of August, in the year of our Lord one thousand eight hundred and eighty-six, at, to wit, the northern district of Illinois, made payment to the said defendant, collector as aforesaid, of a certain large sum of money, to wit, the sum of seventy-eight dollars and ten cents, lawful money of the United States, as duties, under protest, and in order
7 to obtain possession of certain black worsted with cotton back merchandise imported into the United States for them, the said plaintiffs, entered for consumption at the custom-house at the port of Chicago, in the district aforesaid, under the charge and control of the said defendant as such collector; and the said plaintiffs aver that said sum of money above specified, so paid to the said defendant, as aforesaid, as duties as aforesaid, was in excess of the amount of duties authorized by the laws of the United States to be levied, collected, and paid upon the merchandise aforesaid, and was, by the said defendant collector, illegally demanded and exacted of and from the said plaintiffs. And the said plaintiffs aver that within ten days after the ascertainment and liquidation of the duties upon the merchandise aforesaid, by the proper officers of the customs, they, the said plaintiffs, being dissatisfied with the said collector, gave notice in writing to the said defendant, as collector, setting forth therein distinctly and specifically the ground of their, the said plaintiff's, objection thereto, and that within thirty days after the date of the said ascertainment and liquidation, as aforesaid, the plaintiffs appealed to the Secretary of the Treasury of the United States.

And the said plaintiffs aver that the decision of the said Secretary of the Treasury has been had on said appeals, and that this suit has been brought within ninety days after the decision of the said Secretary of the Treasury on such appeals. By means whereof, and by force of the statute of the United States in such case made and provided, the said defendant became liable to pay to the said plaintiffs the sum
8 of seventy-eight dollars and ten cents, lawful money as aforesaid, so illegally demanded of, and under protest paid by, the said plaintiffs as aforesaid, and being so liable, the said defendant afterwards, to wit, on the day and year and at the district aforesaid, in consideration thereof, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay to the said plaintiffs the said sum of money when he, the said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place last aforesaid, became and was indebted to the said plaintiffs in the further sum of seventy-eight and $\frac{10}{100}$ dollars, like lawful money as aforesaid, for money by the said defendant, before that time, had and received to and for the use of the said plaintiffs, and being so indebted the said defendant afterwards, to wit, on the day and year and at the district last aforesaid, in consideration thereof, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned whenever the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, etc.) has not paid the said several sums of money above specified, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant hath hitherto wholly

neglected and refused, and still does so neglect and refuse, to the
9 damage of the said plaintiffs in the sum of two hundred dollars, and therefore the said plaintiffs bring their suit, &c.

P. L. SHUMAN,
Plaintiffs' Attorney.

(Endorsed:) Filed Sept. 10, 1886. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the fifteenth day of September, 1886, came the defendant by his attorney and filed in said clerk's office his plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

In the circuit court of the United States of America for the northern district of Illinois, October term, 1886.

ANTHONY F. SEEBERGER, COLLECTOR, &C.,
vs.
BERNARD CAHN ET AL. } Assumpsit.

And the said Anthony F. Seeberger, defendant, by W. G. Ewing (United States attorney for this district), his attorney, comes and defends, etc., when etc., and says that he did not undertake or promise in manner and form as the said plaintiffs hath above thereof complained against him; and of this the said defendant puts himself upon the country, etc.

W. G. EWING,
U. S. Attorney for Defendant.

10 (Endorsed:) Filed Sept. 15, 1886. Wm. H. Bradley, clerk.

Afterwards, to wit, on the twenty-seventh day of January, 1887, there was filed in said clerk's office a stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

BERNARD CAHN ET AL.
vs.
ANTHONY F. SEEBERGER, COLLECTOR, &C. } Gen. No. 20262.

It is hereby stipulated that the above entitled cause may be submitted to the court for trial without a jury, a jury being hereby expressly waived.

P. L. SHUMAN,
Attorney for Plaintiffs.
W. G. EWING,
U. S. Attorney for Defendant.

(Endorsed:) Filed this 27th day of Jan'y, A. D. 1887. Wm. H. Bradley, clerk.

11 Afterwards, to wit, on the fourth day of February, 1887, in the December term of said court, 1866, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

BERNARD CAHN ET AL.
vs.
ANTHONY F. SEEBERGER, COLLECTOR, &C. } Assumpsit.

Now come the parties by their attorneys, and, upon issue joined herein by agreement of the parties, as per stipulation filed, they waive the intervention of a jury, and for trial put themselves upon the court; and, after hearing a part of the evidence, it is ordered that the further trial of this cause be postponed until to-morrow morning.

Afterwards, to wit, on the fifth day of February, 1887, in the December term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

BERNARD CAHN ET AL.
vs.
ANTHONY F. SEEBERGER, COLLECTOR, &C. } Assumpsit.

12 Now come again the parties by their attorneys, and, after hearing the concluding evidence upon the issue herein, it is ordered that the further trial of this cause be postponed until a future day.

Afterwards, to wit, on the eighth day of February, 1887, in the December term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

BERNARD CAHN ET AL.
vs.
ANTHONY F. SEEBERGER, COLLECTOR, &C. } Assumpsit.

Now come again the parties by their attorneys, and, after hearing the arguments of the counsel upon the issue herein, the court takes the same under advisement.

13 Afterwards, to wit, on the fourteenth day of March, 1887, the following opinion was delivered by Judge Blodgett in said entitled cause, in words and figures following, to wit:

Opinion.

BLODGETT, J.

Plaintiffs imported an invoice of cloths, popularly known as "diagonals," which were classed by the collector as "woolens," and a duty of 35 cents

per pound and 35 per cent. ad valorem assessed upon them under paragraph 362 of the new tariff, as indexed by the Treasury Department.

Plaintiffs insisted that the goods should have been classed as "manufactures of worsted not otherwise provided for," and a duty assessed upon them, under paragraph 363 of the new tariff, at 24 cents per pound and 35 per cent. ad valorem. Plaintiffs paid the duties so assessed under protest, appealed to the Secretary of the Treasury, by whom the action of the collector was affirmed, and brought this suit to recover the excess of duties, which, as they claim, were illegally assessed.

Paragraph 362, so far as it is material to the questions in this case, is as follows: "Woolen cloths * * * and all manufactures of wool of every description, made wholly or in part of wool, not specially enumerated or provided for in this act, valued at not exceeding eighty cents
14 per pound, thirty-five cents per pound and thirty-five per centum ad valorem; valued at above eighty cents per pound, thirty-five cents per pound and in addition thereto forty per centum ad valorem."

And so much of paragraph 363 as is material to this case is as follows: "All manufactures of every description composed wholly or in part of worsted * * * not specially enumerated or provided for in this act, valued at not exceeding thirty cents per pound, ten cents per pound; valued at above thirty cents per pound and not exceeding forty cents per pound, twelve cents per pound; valued at above forty cents per pound and not exceeding sixty cents per pound eighteen cents per pound; valued at above sixty cents per pound and not exceeding eighty cents per pound, twenty-four cents per pound; and in addition thereto, upon all the above-named articles, thirty-five per centum ad valorem."

The proof shows that the goods in question are used mainly, if not wholly, in this country, for the manufacture of men's wearing appearal, such as coats, vests, and pantaloons, and are denominated or known to the trade as "worsteds," and are composed mainly of worsted, but that the worsted fiber is mixed or adulterated with about 10 per cent. of shoddy and some cotton; and the expert called by the Government testifies that this shoddy is composed of wool, or at least that by microscopic
15 examination he found wool to an extent of not less than 10 per cent.

Worsted is made by combing the long-fibered wools so that the fibers shall lie or be arranged alongside of each other, while wool is treated by carding, so as to interlock the fibers with each other.

Generally speaking worsted is wool; that is, it is one of the products of wool; but for the purpose of assessing duties under the customs laws of this country it is obviously considered as a different commodity from wool.

I think that the fair deduction from the proof in the case is that the characteristic quality of these goods is given them by the worsted contained in the yarn from which they are woven, but that, for the purpose of giving them an increased body and weight at a comparatively low cost, a percentage of shoddy, and perhaps cotton, has been mixed or spun in with the worsted fiber.

Shoddy is defined by Webster to be "a fibrous material obtained by dividing or tearing into fibers refuse woolen goods, old stockings, rugs, druggets, etc."

In Ogilvie's Imperial Dictionary it is defined as "old woolen or worsted

fabrics torn up or deviled into fibers by machinery and mixed with fresh but inferior wool to be respun and made into cheap cloth."

16 After old woolen and worsted fabrics have been torn and picked in pieces by a deviling machine, as I understand shoddy to be made, I apprehend that it would be extremely difficult, if not impossible, for a microscopist to distinguish between the wool and worsted of which it was composed. In fact, the product of the deviling process upon old woolens and worsteds would seem to be a separate manufacture of wool as much, perhaps, as worsted, as shoddy is subject to a specific duty of 10 cents per pound when imported. (See paragraph 361, new tariff index.) I am therefore of opinion that these goods, being composed principally of worsted, the worsted giving character to the fabric, were entitled to be classed as a manufacture of worsted, although there was a portion of shoddy, which may have all been made from wool, mixed with the worsted fiber, for the purpose of giving weight and body to the fabric.

Good merchantable or commercial wool, if mixed or combined with worsted, would undoubtedly increase the cost; that is, make a more expensive manufacture than the same weight of shoddy, and hence shoddy is used solely as an adulterant to save so much weight of worsted. Proof was introduced on the part of the plaintiffs showing that these goods are commercially known to the trade as "worsteds," but I think the test as to their classification for the purpose of assessing duties is, whether they are made wholly or in part of what is commercially known as wool or worsted,

17 or whether they are made of a mixture of worsted and the article known as "shoddy." If they were composed of worsted and wool mixed, although the worsted might be the component of chief value, I should be inclined to think them dutiable as woolens.

But these goods are composed of worsted and shoddy, the worsted being the component of chief value, and shoddy, although it may be a product of wool, is not wool within the meaning of paragraph 362, above quoted. Hence I think them dutiable as worsted goods not otherwise specially enumerated or provided for under paragraph 363.

The issue is found for the plaintiffs.

18 On the same day, to wit, on the fourteenth day of March, 1887, there was filed in said clerk's office the special finding of the court in said entitled cause, which said special finding of the court is in the words and figures following, to wit:

B. CAHN ET AL.
vs.
A. F. SEEBERGER, COL'R. } Assumpsit.

This cause having been submitted to the court for trial without a jury, the court, from the testimony, doth find the following facts: That the plaintiffs imported an invoice of cloths popularly known as "diagonals," which were classed by the collector as wo'llens, and a duty of 35 cents per pound and 35 per cent. ad valorem assessed upon them under paragraph 362, new tariff index.

The plaintiffs claimed that the goods should have been classed as "manufactures of worsted not otherwise provided for" under paragraph

363, new tariff index, and the duty assessed at 24 cents per pound and 35 per cent. ad valorem. The duties were paid under protest, appeal taken, and suit brought all in apt time. The goods in question are used mainly for the manufacture of men's wearing apparel, and are denominated or known to the trade as "worsteds," and are composed mainly of worsted,
but the worsted fiber is mixed with at least 10 per cent. of shoddy,
19 this shoddy being made from wool & some cotton. That worsted is
made by combing the long-fibered wools, so that the fibers shall lie or be arranged alongside of each other, while wool is worked by carding, so as to interlock the fibers with each other.

That shoddy is a separate manufacture of wool, and is added to the worsteds in question for the purpose of giving weight and body to the fabric.

Which were all the facts found herein by the said circuit court.

Upon the facts so found the court found the issues for the plaintiffs.

H. W. BLODGETT,
Judge.

(Endorsed:) Filed March 14, 1887. Wm. H. Bradley, clerk.

20 On the same day, to wit, on the fourteenth day of March, in the adjourned March term of said court, 1887, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Judgment.

BERNARD CAHN, CHARLES CAHN, JOSEPH Cahn, Louis Wampold, and David Wallach	
vs.	Assumpsit.
ANTHONY F. SEEBERGER, COLLECTOR OF customs for the port and district of Chicago.	

Now come the parties by their attorneys, and the court, having considered and being now fully advised upon the matters heretofore submitted, herein finds the issue for the plaintiffs and assesses their damages at seventy-eight dollars and ten cents, with interest thereon at six per cent. per annum from date of payment of the various sums set forth in the bill of particulars filed herein; the court also finds that there was probable cause for the acts done herein by said defendant and orders that execution do not issue herein. It is therefore considered and adjudged by the court that the plaintiffs do have and recover of said defendant the said
21 sum of seventy-eight dollars and ten cents, their damages, with interest thereon as herein set forth, together with their costs in this behalf expended, amounting to twenty-six dollars and fifty-six cents.

22 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause wherein Bernard Cahn, Charles Cahn,

Joseph Cahn, Louis Wampold, and David Wallach are the plaintiffs, and Anthony F. Seeberger, collector of customs for the port and district of Chicago, is the defendant, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this ninth day of June, 1887.

[SEAL.] WM. H. BRADLEY,
Clerk.

23 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court between Bernard Cahn, Charles Cahn, Joseph Cahn, Louis Wampold, and David Wallach, as Cahn, Wampold & Co., plaintiffs, and Anthony F. Seeberger, collector of customs for the port and district of Chicago, defendant, in an action of assumpsit a manifest error hath happened, to the great damage of the said Anthony F. Seeberger, collector of customs for the port and district of Chicago, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1887, in the Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this sixth day of June, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the 111th year.

[SEAL.] WM. H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

(Endorsed:) Supreme Court of the United States. Anthony F. Seeberger, collector of customs, &c., plaintiff in error, vs. Bernard Cahn et al., defendants in error. Writ of error. Copy deposited for the defendant in error in the clerk's office U. S., northern district of Illinois.

24 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To Bernard Cahn, Charles Cahn, Joseph Cahn, Louis Wampold, and David Wallach, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second

Monday of October, A. D. 1887, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Anthony F. Seeburger is plaintiff in error and you are defendants in error, to show cause, if any there be, why the said errors mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, judge, this sixth day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

H. W. BLODGETT,
Judge.

Service of citation is acknowledged this 6th day of June, 1887.

P. L. SHUMAN,
P'ff's' Att'y.

(Indorsed:) Supreme Court of the United States. B. Cahn et al. vs. A. F. Seeburger, coll'r. Citation to October term, A. D. 1887.

25 Supreme Court of the United States, of the October term, 1887.

ANTHONY F. SEEBERGER, COLLECTOR,
vs.
BERNARD CAHN ET AL. } In error.

Afterwards, to wit, on the first day of the October term, 1887, before the justices of the Supreme Court of the United States, in the city of Washington, comes the said Anthony F. Seeberger, by the Hon. Augustus H. Garland, Attorney-General, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was against the said Anthony F. Seeberger, collector, and for the said B. Cahn et als. By the law of the land the judgment ought to have been given for the said Anthony F. Seeberger, collector, and against said B. Cahn et als., and the said Anthony F. Seeberger, collector, prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment.

The ATTORNEY-GENERAL (for pl'f in error.)
By U. S. ATT'Y N. DIST. ILLS.

(Indorsed:) Anthony F. Seeberger, pl'f in error, v. B. Cahn et als., def'ts in error. Assignments of error.

(Indorsement on cover:) No. 337. Anthony F. Seeberger, collector of customs for the port and district of Chicago, plaintiff in error, vs. Bernard Cahn, Charles Cahn, Joseph Cahn, Louis Wampold, and David Wallach. N. Illinois C. C. U. S. Filed June 15, 1887.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

ANTHONY F. SEEBERGER, COLLECTOR, etc., plaintiff in error,
vs.
BERNARD CAHN, CHARLES CAHN, Joseph Cahn, and others.
} No. 47.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE PLAINTIFF IN ERROR.

WM. A. MAURY,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

ANTHONY F. SEEBERGER, COLLECTOR, etc., plaintiff in error,
vs.
BERNARD CAHN, CHARLES CAHN, Joseph Cahn, and others.
} No. 47.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT.

The defendants in error, the plaintiffs below, imported an invoice of cloths known as "diagonals."

Goods of this description are used mainly for the manufacture of men's wearing apparel, and

are known to the trade as "worsteds." They are composed chiefly of worsted, but the worsted fiber is mixed with at least 10 per cent. of shoddy, mixed with some cotton.

Wool, as a component of fabrics, admits of specific differences. When the long-fibered wools are combed, so as to make the fibers lie alongside of each other, the fabric into which the fibers enter is called worsted, but when wool is worked by carding so as to make the fibers interlock, the resulting fabric is called woolen. A witness before the Tariff Commission of 1882 gives the following definition:

> All worsted, as I understand it, is wool; but all wool is not worsted. The worsted is the long fiber of the wool combed from the wool. It is a long fiber, susceptible of being twisted up into a harder thread, much more so than the wool uncombed. One is carded wool and the other is combed wool. When made up the worsted fabric is of a harder character than the woolen fabric. (Testimony p. 456.)

Shoddy is a separate manufacture of wool, and is added to the worsteds in question for the purpose of giving weight and body to the fabric.

Shoddy is defined by Webster to be "a fibrous material obtained by deviling or tearing into fibers refuse woolen goods, old stockings, rugs,

druggets, etc." The Imperial Dictionary defines it as "Old woolen or worsted fabrics torn up or deviled into fibers by machinery, and mixed with fresh but inferior wool to be respun and made into cheap cloth, tablecloths, etc."

The collector classed the merchandise in question as woolens, and assessed a duty of 35 cents per pound and 35 per cent. ad valorem, under the following provision of Schedule K of the act of March 3, 1883 (22 Stat., 508).

> Woolen cloths, woolen shawls, and all manufactures of wool of every description, made wholly or in part of wool, not specially enumerated or provided for in this act, valued at not exceeding eighty cents per pound, thirty-five cents per pound and thirty-five per centum ad valorem; valued at above eighty cents per pound, thirty-five cents per pound, and in addition thereto forty per centum ad valorem.

But the importers, the plaintiffs below, claimed that the merchandise in question should have been classed as "manufactures of worsted not otherwise provided for," and the duty assessed at 24 cents per pound and 35 per cent. ad valorem, under the following provision of the same schedule, namely:

> Flannels, blankets, hats of wool, knit goods, and all goods made on knitting-frames, balmorals, woolen and worsted yarns, and all manufactures of every description, composed

wholly or in part of worsted, the hair of the alpaca, goat, or other animals (*except such as are composed in part of wool*), not specially enumerated or provided for in this act, valued at not exceeding thirty cents per pound, ten cents per pound; valued at above thirty cents per pound, and not exceeding forty cents per pound, twelve cents per pound; valued at above forty cents per pound, and not exceeding sixty cents per pound, eighteen cents per pound; valued at above sixty cents per pound, and not exceeding eighty cents per pound, twenty-four cents per pound; and in addition thereto, upon all the above-named articles, thirty-five per centum ad valorem; valued at above eighty cents per pound, thirty-five cents per pound, and in addition thereto forty per centum ad valorem.

This action, after due protest and appeal, was brought to recover the difference between the amount levied at 35 cents per pound and the amount that should have been levied at 24 cents per pound.

By a stipulation in writing, to be found in the record (p. 5), the jury was waived and the case submitted for trial by the court.

The court made a special finding of facts (R., pp. 8, 9), substantially as above, and being of opinion that the plaintiffs should recover, entered judgment accordingly for $78.10, the amount claimed, with interest and costs (R., p. 9).

This writ of error draws in question the validity of that judgment.

ASSIGNMENT OF ERROR.

The judgment is erroneous in this, that on the facts found it should have been for the collector, the defendant below.

ARGUMENT.

The simple question raised by this writ of error is, whether the exception in what may be called the worsted clause of Schedule K of "such [manufactures] as are composed *in part of wool*" is broad enough to embrace the merchandise in question, being, as we have seen, worsteds mixed with a small percentage of shoddy and some cotton.

The learned court below was of opinion, that although the thing commercially known as "shoddy" is a worsted or woolen textile fabric reduced to the condition of *unspun wool*, to be again made into cloth, *it is not wool*, in the sense of the exception in the worsted clause, so as to make the merchandise in question dutiable as a manufacture "composed in part of wool." Fast-

ening upon the provision of Schedule K laying a duty of 10 cents a pound on "woolen rags, *shoddy*, mungo, waste and flocks," the court says that the effect of the mechanical process by which woolens or worsteds are reduced to shoddy is to take the latter completely out of the category of wool or worsted. The result is, it is said, a new materjal, of which the term wool or worsted is not descriptive.

If this is so, then we have the somewhat startling consequence that cloths made entirely of shoddy *are not woolen* in the sense of the tariff, are not, indeed, provided for at all in Schedule K, but are transferred to the residuary section 2513, of the tariff act of March 3, 1883 (*supra*), as "articles manufactured, in whole or in part, not herein enumerated or provided for," and dutiable at "twenty per cent. ad valorem."

We do not think that such an intention can be properly imputed to Congress, especially in view of the statement in the report of the Tariff Commission of 1882, in vindication of compound duties, that "a system of pure ad valorem duties,

it is believed, would admit *an injurious competition of foreign low shoddy goods with the sounder American fabrics*, thus displacing the consumption of domestic wools, a competition equally obnoxious to the wool grower and manufacturer" (Report, p. 30); and in view of the statement, in the same report, that "no part of the existing tariff law has been arranged with so much deliberation and care as that relating to the manufacture of wool," and that, "while largely reducing the rates in the woolen schedule, the commission has deemed it expedient to make *no material change in its general structure*" (p. 29).

Wool, which is the product of deviling woolen and worsted rags, is not the same as wool which has never been spun. It is very inferior to it. It is necessary then to distinguish the one from the other, and this is done by calling this inferior wool "*shoddy*." But is it not doing violence to common sense to say that by designating a certain sort of wool *shoddy*, in order to lay a special duty on it, Congress has manifested a purpose to remove fabrics composed of it from

the category of wool, and set them apart to themselves under the name of *shoddy*?

We do not deny that Congress might do this, but we do deny that Congress has done it, and we think that we are more likely to be carrying out the legislative intent by adopting a natural common-sense interpretation than one that is strained and artificial, and that threatens to flood the country with "foreign low shoddy goods," to the displacement of "the sounder American fabric," which it was the purpose of the Tariff Commission to encourage and protect.

Precisely the same question as is raised by this writ of error came up for decision in the circuit court of the United States for the southern district of New York, in the case of Bernheimer *v.* Robertson, collector, etc. (39 Fed. Rep., 190), and the court (Lacombe, J.) held, that the merchandise there in question, being "worsted coatings," or "cotton-backed worsteds," which, the evidence showed, "has a face of worsted and a back of cotton warp and shoddy filling," were properly classed by the collector as "manufact

ures of wool." In directing a verdict for the defendant the court said:

> I shall not determine this case upon any close analysis of mere phrase. I can not escape the conviction that in the 362d paragraph it was the intention of Congress to cover, and that they have used the proper words for covering, generally and comprehensively, manufactures of wool, whether they were made of wool by one step or by two, and that from that general class are to be differentiated only such other cases as they elsewhere refer to. In *Elliott* v. *Swartwout* (10 Pet., 137) there was such differentiation by the express use of the words "manufactures of worsted." The use of that phraseology, coupled with the testimony in that case as to the trade meaning of worsted, enabled the court to find in it provision for another class of articles. Here, however, there is nothing in the tariff act covering the goods now before us except the provision as to manufactures of every description composed wholly or in part of wool. Inasmuch as there is no differentiation of any manufactures of shoddy, waste, or flocks, I am led to the conclusion that manufactures into which the last-named articles enter are enumerated only under paragraph 362. I am, therefore, constrained to direct a verdict for the defendant.

It is respectfully submitted that the judgment should be reversed.

WM. A. MAURY,
Assistant Attorney-General.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

ANTHONY F. SEEBERGER

v. No. 47.

BERNARD CAHN ET ALS.

BRIEF OF DEFENDANTS IN ERROR

Statement.

In the summer of 1886, Messrs. Cahn, Wampold & Co.--plaintiffs below, now defendants in error --imported into Chicago certain cotton-back worsted goods, "*popularly* known as diagonals," (Rec. 8, bottom) but *to the trade* as "*worsteds*" (Rec. 9 top) upon which Mr. Seeberger, then collector of that port, assessed a duty of thirty-five cents a pound and thirty-five per centum ad valorem, under the italicized portion of this provision of the act of March 3, 1883, Schedule K—"Wools and Woolens;"—

Woolen cloths, woolen shawls, and *all manufacturers of wool* of every description, *made wholly or in part of wool, not specially enumerated or provided for in this act, valued at not exceeding eighty cents per pound thirty-five cents per pound and thirty-five per centum ad*

valorem: valued at above eighty cents per pound, thirty-five cents per pound and in addition thereto forty per centum ad valorem. 22 Stats., 508 bottom; Heyl's Dig., Par. 362.

Against this exaction the plaintiffs below seasonably protested, appealed and brought this action, claiming their goods to be dutiable at twentyfour cents a pound and thirty-five per centum ad valorem, under the italicised language of the clause of the tariff next following that above quoted, viz.:—

Flannels, blankets, hats of wool, knit goods, and all goods made on knitting-frames, balmorals, woolen and worsted yarns, and *all manufactures, composed wholly or in part of worsted*, the hair of the alpaca, goat, or other animals (except such as are composed in part of wool) *not specially enumerated or provided for in this act*, value at not exceeding thirty cents per pound, ten cents per pound, and not exceeding forty cents per pound, twelve cents per pound; * * *valued at above sixty cents per pound, and not exceeding eighty cents per pound, twenty-four cents per pound: and, in addition thereto, upon all the above-named articles, thirty-five per centum ad valorem.* * * (22 Stats. 509 top; Heyl, p. 363.)

A jury having been waived, and the cause submitted for trial by the Court (Rec. 5, fol. 10) the question is, which of the foregoing provisions is applicable to these importations upon the facts thus found by the Court, viz.:—

That the plaintiffs imported an invoice of cloths popularly known as "diagonals," which were classed by the collector as woolens, and a duty of 35 cents per pound and 35 per cent. ad valorem assessed upon them under paragraph 362, new tariff index.

The plaintiffs claimed that the goods should have been classed as "manufactures of worsted not otherwise provided for" under paragraph 363, new tariff index, and the duty assessed at 24 cents per pound and 35 per cent. ad valorem. The duties were paid under protest, appeal taken and suit brought all in apt time.

The goods in question are used mainly for the manufacture of men's wearing apparel, and *are denominated or known to the trade as "worsteds,"* and *are composed mainly of worsted*, but the worsted fiber is mixed with at least 10 per cent. of *shoddy*, this shoddy being made from wool and *some cotton*. That worsted is made by combing the long fibred wools, so that the fibers shall lie or be arranged alongside of each other, while wool is worked by carding, so as to interlock the fibers with each other.

That shoddy is a separate manufacture of wool, and is added to the worsteds in question for the purpose of giving weight and body to the fabric.

Which were all the facts found herein by the said circuit court.

Upon the facts so found the court found the issues for the plaintiffs (Record, pp. 8, 9; fols. 18, 19).

Judgment was entered accordingly. (*Ib.*, fols. 20, 21.)

POINTS.

Disregarding (as of no legal consequence) the slight admixture of cotton, it is conceded that all the other materials of which our goods are composed were once the fleece of sheep.

If the character this origin confers was so fixed as to adhere to the article, for dutiable purposes and in commercial transactions, through all subsequent manipulations, so that it was always designated by the name or adjective appropriate to and indicative of that origin, we should have no case, and the learned judge below would be found to have fallen into that error which the government here attributes to him.

But while it is true that, in a scientific classification of textile substances, this origin of the constituent of our goods would always be recognized by designating them as animal fibre, yet this common derivation of various articles of commerce is ignored in its transactions and nomenclature, and in the provisions and enumerations of our tariff laws.

Confining the application of the observation to wool fibre, we can safely say that the terminology of trade has, for many centuries, distinguished between products obtained, by varying manipulations, from the same raw material; and has treated the articles so produced as distinctively as if they had no common origin. From its early days down to the act of March 3, 1883, our tariff legislation has done the same; and has so done, because of its intended application and reference to the operations and designations of commerce.

As no word can appear in public speech or legislation until the thing it represents is first known as possessing certain characteristics, differentiating it from other articles of like origin or character, or used for the same

purpose, the terms "worsted" and "shoddy" must have conveyed to the minds of the merchant, manufacturer and consumer a certain form and manipulation of wooly fibre, differing in some respects from all others, before the distinction was recognized in legislation.

"The *commercial* designation, as we have frequently decided, is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws."

Robertson vs. Salomon, 130 U. S., 415.

In the present instance the ordinary and commercial meanings of "worsted" and of "shoddy" coincide in the case of each material.

One or the other of two adjoining clauses of Schedule K of the Act of 1883 is admittedly the basis for dutying these importations, the issue being which of these two clauses applies.

The first includes "all manufactures of *wool* of every description," etc.

The second covers "all manufactures of every description composed wholly or in part of *worsted*," etc.

The line preceding the first of these clauses imposes upon "Woolen rags, *shoddy*, mungo, waste and flocks, ten cents a pound."

Placing these two clauses in juxtaposition serves to emphasize the antithesis between the words "wool" and "worsted," as designating distinctive *materials of manufacture* in trade and commerce; so that worsted as a constituent would control the rate of duty, unless another component of the article was the material *commercially* known as wool.

The different appearance and characteristics which are given to worsted by the manipulations of its manufacture have been known for centuries; and they have been defined in English speech and business by this term ever since the Flemings, invited over by Edward

III. in 1331 (at the suggestion of his Queen, who was daughter of the Earl of Hainault) carried on these operations in the town of Worsted, in Norfolk; the name of the place of manufacture soon coming to indicate the thing there made, as often happens.

Our earliest, tentative tariff made little or no discrimination among, or enumeration of, textile fabrics. But in 1816 worsted, as contradistinguished or manufactured from wool and woolen, appears in our tariff (3 Stats. 310); and that distinction has been perpetuated in such legislation from that day to this.

It could not be otherwise in laws intended to affect commercial transactions. These could not ignore a fact so prominent; whereby, in England, different districts had prospered in giving in each exclusive attention to the separate article; Leeds being the centre of the woolen and Bradford of the worsted manufactory. For woolens, you would no more go to Bradford than to Sheffield; for worsteds, no more to Leeds than to Birmingham.

In this country, different corporations and different mills are established for the separate manufacture of these articles. If, in exceptional instances, one corporation here makes both, it is done in separate mills, and the distinction in the operations, as a business enterprise, is noted in its charter. Slater Woolen Co. v. Lamb, 143 Mass., 420.

However unnecessary it may be to do so, the Court would be surprised did we not call to its attention its own decisions construing these tariff recognitions of the difference berween wool, or woolen, and worsted.

Referring to the Act of 1832, it is said:

"It being admitted in this case [See our present record, p. 9, top] that worsted is a distinct article, well known in commerce under that denomination, we must understand Congress as using the term in that commercial sense, and as contradistinguished from *wool* AND *woolen goods*," etc. Elliott v. Swartwout, 10 Pet. 152.

We break off this quotation to interject the remark that this language endorses the construction we have hereinbefore given the statute, while we had not this phraseology of the Opinion in mind; viz., that worsted is not only distinguished from *woolen*, in the manufactured article, but is distinct from *wool*, as a raw material of further manufacture.

The Opinion continues:—

"The classification of the article in this section shows that Congress had in view a class of goods known as *worsted* goods, [see our Record, p. 9 top] as contradistinguished from *wool*, and upon which a different duty is laid. . . . If, because worsted is made of wool, all manufactures of worsted become woolen manufactures, there would be no propriety in enumerating worsted goods as a distinct class." (*Ibid.*)

The act of 1832, then under consideration, not containing the existing provision for goods "in *part* of worsted," (but of *silk* and worsted) it was urged that adding cotton borders to the worsted shawls, and cotton ends to the worsted suspenders, took them out of the category of "worsteds," etc., and left them to be dutied independently of the worsted clause. Examining this claim, the Court say that a worsted shawl or suspenders, not being wool, does not become wool by the addition of cotton borders or ends; concluding this part of the case thus:

"At all events, the answer to be given the question, as put, must be that the shawls and suspenders are not a manufacture of wool, or of which wool is *a component* part."

Elliott v. Swartout, 10 Pet. 153.

The fact that worsted was merely wool dealt with in a particular way did not make wool a *component* of an article containing worsted.

The Chief Justice in a cause tried at circuit concluded:—

"But the component part of these goods, which has

given rise to this controversy, is not only combed wool but is worsted, and it must be dealt with accordingly."

Riggs v. Frick, Taney, 105.
Chester v. Curtis, 1 Blatch., 499.

The Court, to whom our cause was submitted, found as a fact that the goods in question

are denominated or known to the trade as 'worsteds' and are composed mainly of worsted, but the worsted fibre is mixed with at least ten per cent. of shoddy, this shoddy being made from wool and some cotton.

That worsted is made by combing the long-fibred wools, so that the fibres shall lie or be arranged alongside of each other, while wool is worked by carding, so as to interlock the fibres with each other.

That *shoddy is a separate manufacture of wool*, and is added to the worsteds in question for the purpose of giving weight and body to the fabric. (Record, 9 top, fols. 18 and 19.)

The recognition of 'worsted' and its manufactures, in every tariff from 1818 down, makes its status res judicata. The position thus given it in law was long before assigned it in fact, in manufactures, commerce and common life.

The combing into parallel lines of wool fibres, to commence the manufacture of worsted, is effective upon this material in several ways. It eliminates the short fibres or noil, which is curly and kinky and better adapted for felting or milling (fulling) than for a twisted cord. The wool fibre has many thousand imbrications or serrations in every inch of its length, which tend to make the fibres cling together; and these imbrications are far more numerous in the short than in the longer fibre, in which they are further reduced and neutralized by the combing process.

Burnley on Wool and Wool-Combing, 3, 4.
Beaumont Wool and Worsted Manf., pp. 4, 5, § 4.

The result of selecting the longer and smoother fibres is that they can be more readily drawn out and twisted into a smaller, stronger and harder yarn and stronger cloth thereby produced.

This is the characteristic noticed in our dictionary definitions.

"Worsted. *n.* Thread spun of wool that has been combed with heated combs, and which, in the spinning is twisted harder than ordinary."

Worc. Dict., citing Simmonds.
See also the Imperial Dictionary, Webster, and others.

As we have spoken of the use of 'worsted' in the tariff antithetically both to 'wool' and 'woolen,' we will note that it appears as a substantive and an adjective in the dictionaries; the latter being thus defined by Worcester and the Imperial;—"Consisting or made of worsted. Worsted yarn." This use of the word regards it as the raw material of other articles.

Mr. Beaumont commences his valuable book by noticing "Four Methods of Diversifying a Woven Product:" III. "By the use of different classes of yarn" (Beaumont, Woolen and Worsted, p. 1.)

Not only is it possible, however, to produce a variety of cloths from totally different types of fibres, such as silk, cotton and flax, but when limited to one material, like (for example) wool. (*Ib.* 3, § 2).

Upon a later page, he observes:

55. "The character and general appearance of a woven texture is dependent, to a certain extent, upon the *mechanical structure of the thread* used in its production. A good illustration of the effect different systems of making yarn have on the nature of the woven fabric is to be found in the worsted and woolen goods; where, although both cloths may be manufactured from a similar class of wool, and dyed to the same shade, yet they are almost as distinct from one

another in the finished state as cloths produced from separate classes of textile fibres." * * *

Beaumont, Woolen and Worsted, 95 *et seq.* § 55.

He shows (p. 254, § 153) that different weaves are applicable to worsted and woolen yarns; that the effect of the finishing (pp. 372–4, §§ 228–9) is different; that worsteds do not mill, or full, or felt, like woolens (pp. 236, 376, § 231) which he attributes to fewer serrations in the worsted.

These facts and distinctions are stated as indisputable (or not a subject of controversy) by all the standard authorities.

In writing the preceding pages, we have been altogether conscious that we were exposing ourselves to the criticism that we were dwelling upon and elaborating a distinction the existence of which is no longer denied by anybody; but it may easily have been inferred that we desired especially to attract attention to the *nature* of the distinction, that it might be seen that the difference between shoddy and wool is even greater than between wool and worsted.

And, further, that it required the same effort, by appeals to this Court and the circuit courts, to compel recognition by customs officers of that distinction long known in commerce and finally recognized in the tariff, which we are now compelled to make in behalf of shoddy.

It usually takes more than one appeal to this Court to induce the administrative officers to pay any attention to the law which it is their sole function to faithfully execute, if its new provisions reduce the rate of duty, or so change a classification as to lessen the amount of duty, upon any article.

The Attorney-General's contention (Mr. Maury's brief, p. 5 bottom) that the shoddy in our goods is "reduced to the condition of *unspun wool*" is directly in opposition to the finding of fact that it is "a separate *manufacture of wool*" (Rec. 9 top) and to the further obvious fact that wool which has once been subjected to the process of spinning, and those preliminary thereto, can never again be so manipulated. This the Attorney-General himself recognizes, in the commencement of the last paragraph upon page 7 of Mr. Maury's brief, where he states that the be-devilled product is "not the same as wool which has never been spun" but "very inferior to it;" and that it is because of and to mark these different characteristics it has received the distinctive name of "shoddy." But he follows this by an erroneous supposition of fact—or of something not yet done by Congress—that "a certain sort of *wool*" has been designated in the tariff as shoddy; whereas the case finds (Rec. 9 top) that it is not "wool" of any sort, but "a separate *manufacture* of wool" which is so designated.

Being a manufacture of wool, it is no longer the article 'wool' itself, but something made from it. A contract for so many bales of wool would not be satisfied by the tender or delivery of the specified number of bales of shoddy.

Wool is *grown;* and then used in making other things therefrom.

If these other things, made therefrom, have a commercial designation of their own, which our tariff recognizes and adopts, then another article made from these manufactures is not made of wool, within the meaning of the law. The distinction taken by this court in Meyer v. Arthur, 91 U. S., 570, holds; that, though an article made of worsted and shoddy may be derived *from* wool, yet it is not made *of* wool; since the wool fibre therein has lost its distinctive characteristics and commercial name by the several manipula-

tions it has undergone as much as red lead had been commercially separated from the original metal. Or, as Judge Blodgett better expresses the idea; "it is one of the *products* of wool," commercially distinct from wool.

Wool is the raw material; but shoddy is a manufacture certainly even farther separated therefrom than worsted is.

Judge Blodgett thus states it;—

> "Generally speaking, worsted is wool; that is, it is *one* of the products of wool; but for the purpose of assessing duties under the customs laws of this country, it is obviously considered as a different commodity from wool." (Rec. 7, fol. 15)

What the learned judge means by shoddy being "a separate manufacture of wool" is manifest from the definitions to which he refers in his Opinion; (*Ibid.*) that it is *another* of the "products of wool" of which worsted is one.

These definitions indicate that goods which have once been made, from wool, into either woolen or worsted articles, are still further removed from their original material by another process of manufacture. Thereby this new subject of commerce is created *incapable of being used as wool is.* Wool can be made into woolen or worsted yarns and goods; or mixed with silk, cotton or other textiles. Shoddy is almost incapable of being used independently; but its ancillary use is one to which raw wool is not adapted.

Shoddy is "a separate manufacture" carried on in mills dedicated solely to making it, by machinery invented for that purpose.

Of this, the Court would take judicial notice had not Judge Blodgett expressly so found (Rec. 9, top) it is so generally stated in all books of reference, technical and common.

"Shoddy. old woolen cloths and refuse goods, torn

into fibres in a mill, and respun into yarn, with the addition of a little fresh wool." Worc. Dict., citing Simmonds.

"Shoddy is made into an inferior cloth, into drugget, padding and other articles." (*Ibid.*)

"A fibrous *material* obtained by deviling or tearing into fibres refuse woolen goods, old stockings, rags, druggets, etc." Webst. Dict.

It differs from *mungo* in being of an inferior quality, and is spun into yarn with a little fresh wool, and made into coarse cloth." (*Ibid. citing Simmonds.*)

The Imperial Dictionary gives same definition, and also defines

"Shoddy-mill. A mill employed in the manufacture of yarn from old woolen cloths and refuse goods." (Imp. Dict.)

"Shoddy, mungo and flocks. A few words must here be said on remanufactured fibres, known to the world. There are few more unreasonable and foolish prejudices than that against shoddy, and so far from it being a term of reproach, it should really be one of praise; for the man who first brought shoddy into use has conferred an incalculable benefit to the world, and enabled millions of persons to be warmly and cheaply clothed, who must have otherwise been shivering with cold." * * * [Defining shoddy, mungo, flocks and extract.] "Shoddy is the best of all these, being longest in fibre, but when it is examined under a microscope, it is seen that the scales are destroyed to a great extent, and the fibre uneven as if it had been stretched too much in previous operations. * * * As shoddy is *made largely from combed wool* it would appear that the fibres are, to some extent, damaged by the many operations of the *worsted* trade. The best and longest shoddy is made from hard *worsted* spinning waste." McLaren, Spinning Woolen and Worsted, 187–8.

13. *Difference between Woolen and Mungo.*—The properties of a good wool are necessarily of a very superior character to those of mungo. Under the microscope there is not always a marked dissimilarity between the fibres, the filaments of some mungoes being in a far more perfect state of preservation than others. Some-

times the fibres are partially stripped of serrations, but probably others might be examined from the same handful of material possessing, when microscopically examined, the complete mechanical development of the wool fibre. Evidently the difference between mungo and wool does not arise in the main from any necessary dissimilarity in the structure of the fibres. Practically, mungo possesses no definite length of fibre—staple, as compared with wool, it has none—while in elasticity and strength it is also deficient. Doubtless some of these deficiencies are due to the mutilation of fibre occasioned in the grinding process to which the rags are submitted, and in which filament is forcibly torn from filament, causing, as a natural consequence, the material to be short, brittle, and wanting in elasticity.

Of course the milling power of mungo depends entirely on the nature of the wool used in making the cloth from which the fibre has been obtained. If the rags ground up were originally made from an excellent fulling wool, then the mungo will undoubtedly possess a certain degree of felting property. Shoddies, though longer in the fibre than mungoes, do not usually felt so well; the wools employed in the production of the rags from which they are recovered being principally of an inferior *fulling* power.

Beaumont, Woolen and Worsted Manuf., p. 18, § 13.

The inferior fulling power is because the shoddy is generally derived (or largely so) from *worsted* rags.

This author observes, upon a subsequent page, that a slow-speeded, heavier loom has to be employed upon the weaving of these cloths with a tender warp than upon woolens and worsteds. (*Id.* p. 200, § 117.)

Shoddy, having become before then well-known as "a separate manufacture," first appears as an independent subject of duty in the tariff of Aug. 30, 1842, c. 270, § 7 (5 Stats. 557.)

It reappears, as regularly as wool, worsted, silk or cotton, in subsequent enactments; Act of 1846, § 11 (9 Stats. 49); Act, July 14, 1862, § 6 (12 Stats. 549,

bottom); Act, June 30, 1864, § 4 (13 Stats. 206, last line); Act, March 2, 1867, § 1 (14 Stats. 560, last lines); Rev. Sts. (2d ed.) p. 471, near bottom; Act of March 3, 1883. (22 Stats. 508, bottom.)

The sum of it all is that, although worsted and shoddy are both mechanically produced from wool and are possessed of a wool fibre, more or less tortured and bedeviled in their production, neither are *wool* in the language of common life, nor within the purview of our existing tariff.

Zoologically considered, merely as so much animal fibre, worsted and shoddy might be treated as pertaining to wool; commercially speaking, and in the eye of the manufacturer, they have nothing in common with it. The processes of manufacture, and the demands and nomenclature of commerce, have differentiated them absolutely, entirely and forever, from wool, as "a separate article of manufacture."

They can no more again become *wool* than they can *fleece*, and reassume their place upon the sheep's back.

Why the consequence, that cloths made entirely of shoddy (*if there were any such*—which, practically, there is *not*) would not in the sense of the tariff be "woolen," should be any more "startling" (Mr. M's brief, page 6 middle) than the fact recognized by sixty years of such legislation that a cloth every stitch of which is worsted, is neither woolen nor in any part of wool, we do not perceive. (10 Pet., 153.)

But there is a distinction—not recognized, but confounded, in Mr. M.'s brief—between the term 'woolen' (which he uses) and the word 'wool' as used in the clause of the tariff under consideration. Mr. M. argues the somewhat startling consequence of holding that cloths of shoddy "are not *woolen*"—using the adjective, implying something made, more or less remotely, from wool; whereas the tariff uses only the substantive—in-

dicating that the *substance commercially known* as "wool," as a raw material, must be a component part of an article to affect it with the wool duty.

Woolen may indicate origin; wool must indicate a constituent.

The error in the Attorney-General's reading of Elliott vs. Swartwout (10 Pet., *137 to *159) appears in his conclusion that the mercantile distinction there recognized was between "*manufactures* of wool" and "*manufactures* of worsted."

Even a cursory examination of the case and opinion shows that although the importations happened to be manufactured articles—the pertinent inquiry there (as here) was as to the *material* out of which they were made.

The parties and the Courts confined the investigation to the character of the *components* of the shawls there in controversy (*Id.* 151) the importer asserting them to be cotton and worsted, and the collector that they were cotton and wool; and the Court decided—*not* that they were manufactures of worsted (for they were partly cotton)—but that wool was no *component* of the merchandise. (See the case *passim*; especially the close of this branch of the discussion at the end of Par. I, page *153.)

The government brief in the cause at bar concludes with the quotation in full of an opinion of Judge LACOMBE, resting his ruling upon the assumed existence of a differentiation in the statute under which Elliott vs. Swartwout was decided, and in that case, between "manufactures of wool" and "manufactures of worsted." (See Atty. Gen's. brief, p. 9, and 39 Fed. Rep., 191).

In view of his experience, and of the unusual care with which Judge LACOMBE applies his great abilities to the examination of these dry topics, it will perhaps

surprise this Court to perceive that *there was no* SUCH *differentiation* in the act of 1832 (4 Stats. 584, Paragraph "Second") nor in the case;—and the fifth proposition of Atty. Gen. Butler's argument was that if Congress had intended the discrimination claimed by Mr. Elliott, it would have been accomplished "by introducing a general clause relative to *worsted* similar to that respecting woolen"—which was not done (10 Pet. 142, §5).

The "Second" paragraph of Sec. 2, Act of July 14, 1832, c. 227 (4 Stats. 584), there considered, imposed "on worsted stuff good, shawls and other manufactures of *silk* and worsted, ten per centum ad valorem; on worsted yarn, twenty per centum ad valorem; on woolen yarn, four cents a pound and fifty per centum ad valorem." * * * * "and upon merino shawls made of wool, all other manufactures of wool, or of which wool is *a component part*, and on ready made clothing, fifty per centum ad valorem." (4 Stats. 584.)

It will be seen, this paragraph only differentiates between such worsted *stuff* goods, shawls and other manufactures, as were made of a mixture of silk and worsted and merino shawls and other manufactures made of wool, or of which wool is a component.

Throughout James' History of the Worsted Manufacture, upon almost every page, and in numerous Acts of Parliament cited, it will be found that "stuff goods" implies fabrics of which worsted is a distinctive constituent; although he says (page 112) "Fabrics of worsted and silk mixed were made at Norwich in 1570" and thereafter; but the statutory language employed in 1832 left no doubt of what was there intended. Therefore this Court refused to declare whether the shawls, etc., in controversy were dutiable as manufactures of worsted, or how otherwise; explicitly confining itself to answering the proposed question, whether wool was any component of them; and this it decided negatively. (10 Pet. 153.) Declining to say how they should be

dutied, it affirmed them not to be dutiable as being of wool, or in any part of wool. *(Ib.)* Whether or not any other language of that act was applicable was immaterial; this clause was inapplicable. Hence, the supposed differentiation assumed in the opinion quoted by the Attorney-General not only did not exist in the act of 1832, but this court held that it would consider no other clause than that pertaining to wool as a material or component; and determined that wool did not there mean an article not *commercially* known and dealt in as wool.

It may be noticed in passing that in Atty.-Gen. Butler's cited fifth proposition (10 Pet. 142) he substituted the adjective "woolen" for the noun "wool" which the statute employs; and the present Atty.-General does the same in his brief (page 6, middle).

The circumstance that such substitution becomes necessary to maintain the government's theory of the true construction of this statute is somewhat significant.

Wool, spoken of as a component, indicates the wool of commerce—dealt in and known as wool; *woolen* may mean pertaining to wool, as well as made or composed of wool. In either sense, *woolen* indicates wool which has been manipulated into something else; something *commercially* different. Nobody would speak of a vessel as about to arrive from Rosario with a cargo of *woolens* if she merely had bags or bales of *wool* on board. We say our goods are not even *woolens*—certainly not, commercially speaking; but they might even be that, and yet in no part of wool, within the meaning of the statute.

When the tariff speaks of an article "in part of *wool*" it means one into the composition of which some of the wool of commerce has been directly worked as a raw material thereof, and not after it has been so manipulated as to pass into and become another article *not* commercially known as wool.

Thirty years ago, the Treasury Department itself recognized this plain distinction. Its letter of Sept. 1, 1860, instructed the Collector at New York that

"The term 'hats of wool' applies *only* to hats the bodies of which are composed of *wool that has undergone no process of manufacture* except felting or fulling, and *not* to hats made of *woolen* cloth." Heyl's Digest (edition of 1879) page 95, note §.

Even if a hat made from woolen cloth was a woolen hat, it was not a hat "of wool," within the meaning of the tariff.

Suppose a man indicted for stealing a bale of *wool*: could he be convicted upon proof that he took a bale of *shoddy*?

The Massachusetts Court thus answered such a question:—

"If an article has obtained in common parlance a particular name, it is erroneous to describe it by the name of the material of which it is composed."

Com. v. Clair, 7 Allen, 527.

This was a criminal case; but the decision merely applies to it the usages and common sense of everyday life and speech. *Reg. v. Mansfield*, *1 Car. & M.* *140.

It has become the fashion of late for all representatives of the government who argue customs-revenue cases either to a court or to a jury to assume that *all* tariff laws were *primarily* intended for the protection of American manufacturers; and from this postulate practically to draw the inference that it is permissible for them, if not for the judicial department, by strained construction and disregard of precedent to sustain whatever exactions a like view of their own duty may lead administrative customs officers to demand from importers of foreign goods.

Without dwelling upon the idea that the act of 1883 (under which we claim) was enacted to reduce duties, and only barely suggesting that the tariff legislation of

over sixty years has uniformly placed a higher duty upon articles made directly from wool that has merely been carded before being spun than it has upon those made from material more indirectly derived from wool, by combing or subjecting it to other or further manipulations or operations before it becomes the raw material of the articles imported, we would observe that if the assumption of a purpose to protect were conceded to the fullest extent this would not advance the Attorney-General's argument. It must even then be conceded to us, upon the other hand, that the accomplishment of that purpose was only sought, and thus only can be attained, by the imposition and collection of just such duties as the law has prescribed; and, if these are not effective, it is for Congress to substitute more effective measures. The phraseology of the statute, whatever its purpose, was selected with full knowledge of previous decisions and of the canon of construction that no presumptions would be indulged by the court to exact any higher rate of duty than its terms clearly imposed.

Hartranft v. Weigmann, 121 U. S. 616 top and citations.

Certainly, no greater measure of protection was intended than just what these terms, properly construed, provide.

But the Attorney-General's argument in the present case goes beyond anything heretofore claimed. It is not simply that this revenue law of the United States was framed to protect American manufactures and American labor; but that it was an exercise of the police power; to protect the citizen from himself, as well as the wiles of the crafty foreigner; to prevent him from clothing himself in cheaper fabrics made of inferior material, and to compel him to wear garments made from good, sound, first-hand wool, that has never (in any form or transmutation) adorned any other back than his own since it left that of the animal upon which it grew.

If any such considerations had actuated those enacting this law they would have assessed shoddy, imported as raw material, higher than clothing wool, instead of the same rate as such wool unwashed, half what it pays washed, and one-third what it pays scoured. Now, even upon the Attorney-General's theory, the American citizen is not preventively protected against wearing clothes made in this country from imported shoddy, any more than he is from those made of patriotic, home-made rags.

This part of the Atty.-General's argument is so *dehors* anything with which this Court has to do, in construing this law, that it is only referred to as a fair sample of the extraneous considerations that lead customs officers to illegal requirements, excessive exactions and untenable constructions.

It is like the action of a Secretary imposing a test of the saccharine strength of imported sugar, which test Congress had not prescribed, because he inferred Congress must have intended that duty should be proportionate to sweetness; or of an earlier one who said that animals imported for breeding purposes must be found by the Collector to be "of superior breed" before they could be admitted free, although Congress had imposed no such condition; because he inferred Congress must have intended that the domestic breed should be improved by the importation. This Court denied to the Secretary the power thus to enlarge the meaning, or add to the terms and conditions, of the Statute upon any such inference or imputation of a Congressional design not definitely expressed.

Merritt v. Welsh, 104 U. S. 694.
Morrill v. Jones, 106 *Id.* 467.

"It is never very safe ground, in the construction of a statute, to give weight to views of its policy, which are themselves open to doubt and controversy."

Munic. Bldg. Soc. v. Kent, 9 App. Cas. 273.
Sutton v. Sutton, 22 Chan. Div. 518.

Inasmuch as Congress has legislated in the light of the existing distinction, recognized in trade and commerce, among manufacturers, importers and wholesale dealers, not only of this country but also in Great Britain and the Continent, and agreeably to the statutory distinctions Congress has heretofore made or recognized between the different products of the fleece or fibre of sheep,—it must necessarily follow that, if the word "wool" when applied to a particular product of the fleece of the sheep has in such trade and commerce a special and restricted meaning,—a name for a particular article differentiating it from other articles known by different names,—Congress when it used the word in its legislation, used it in this restricted sense;—and when it excepted from its provisions in paragraph 363 of Schedule "K" goods composed in part of "wool" it did not intend to except all goods made from the fleece of the sheep, but intended to except such goods only as are made of yarns from the fleece of the sheep and are then known as "wool," as contradistinguished from those made of yarns (or otherwise from the fleece of the sheep) which are known by the names it therein uses for the special enumeration and provision.

If the correctness of this theory be conceded, then it must follow that our goods, being a worsted fabric "commercially"—being commercially known as "worsteds" (Record, p. 9 top), or "cotton back worsteds," (*Ib.* p. 4 top; p. 7; fol. 14), and containing no "wool" *i. e.* of yarns that have been "carded"—are not within the exception of paragraph 363 of Schedule "K;" and, being a manufacture in part of worsted, the goods are properly dutiable under it.

Any different construction must make very serious havoc in the construction of this provision of the Tariff. If the word "wool" be given its broadest sense, then all worsted goods would be excepted for they too are in this sense composed of wool. We submit that two different constructions of the word "wool" as used in

this paragraph of the Tariff, one in a restricted sense so as to except "worsted" which is therein specially mentioned, and again in its broadest sense, so as to include "shoddy," which is not *therein* mentioned, would be such a new and inconsistent and irreconcilable principle of construction, as to make it a dangerous precedent for the Court to establish, even if it were so important to give extra protection for our domestic manufacturers against importations like ours, which appears to be the urgent and only excuse given for the assessment of this duty.

The Query,—what duty is chargeable on manufactures of *shoddy* under the Tariff of 1883, is not a question which it is necessary to decide here. Our goods are "wholly or in *part* of *worsted*," and in fact known as a species of those fabrics known as "worsteds" (Rec. 7, fol. 14), and as such are specially provided for in that paragraph numbered 363 in Mr. Heyl's index, and are not taken out of it by the terms of its exception, and are therefore affirmatively included within it, under the rule "*exceptio unius*," etc.

In regard to the citation taken by the Attorney-General from 39 Fed. Rep., 190, it might be sufficient to say that every case, and the application of the law thereto, must depend upon its peculiar facts; and that we are here to be governed by those found by Judge Blodgett, and would discuss the opinion of Judge Lacombe when that record is presented; but we may say, in addition to what has hereinbefore been suggested, that the inquiry is whether or not Congress has differentiated worsted, shoddy, mungo, etc., from wool *as a raw material*, or as a constituent of an article, rather than the completed manufactures of each material. We think the answer inevitably must be that given by Judge Blodgett; that it discriminates as to those commercially distinct articles which are the several components of the completed manufacture.

We are not under obligation to discover and state the reason why Congress did not duty "manufactures of shoddy" separately; but we may easily suppose that the fact that were then (and still) practically no such manufactures in existence to be a sufficient one.

What the percentage of shoddy was in the goods to which Judge Lacombe referred does not here appear; but it does appear in the present record (p. 7, fol. 14; p. 9 top) that about ten per cent. of shoddy was in our goods; of which part was cotton and the rest of wool (or worsted) origin.

Commercially known as "worsteds" (p. 9 top); bought and sold as such, and "composed mainly of worsted" (*Ib*) they were "substantially" worsted, and should be so deemed for tariff purposes.

Swan v. Arthur, 103 U. S., 597.
Arthur v. Butterfield, 125 *Id.*, 70.

But in fact they contained *no* "wool" as a component, or raw material.

EDWIN B. SMITH,
CHARLES CURIE,
Of Counsel for the Defendant in error.